UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANNA PATRICK, et al.,

Plaintiffs,

v.

DAVID L. RAMSEY, III, et al.,

Defendants.

CASE NO. C23-0630JLR

ORDER

## I. INTRODUCTION

Before the court are two motions filed by Plaintiffs:[1] (1) a motion for reconsideration of the court's order dismissing their unjust enrichment claims with prejudice (MFR (Dkt. # 38); MFR Reply (Dkt. # 50); *see* 10/12/23 Order (Dkt. # 35)) and (2) a motion for leave to amend their complaint (MTA (Dkt. # 40); MTA Reply (Dkt.

[1] Plaintiffs are Anna Patrick, Douglas Morrill, Roseanne Morrill, Leisa Garrett, Robert Nixon, Samantha Nixon, David Bottonfield, Rosemarie Bottonfield, Tasha Ryan, Rogelio Vargas, Marilyn Dewey, Peter Rollins, Rachael Rollins, Katrina Benny, Sara Erickson, Greg Larson, and James King (collectively, "Plaintiffs"). (Compl. (Dkt. # 1) ¶¶ 16-66.)

# 52)). Defendants David L. Ramsey, III and The Lampo Group, LLC (together, the "Lampo Defendants") oppose both motions.[2] (MFR Resp. (Dkt. # 49); MTA Resp. (Dkt. # 51).) The court has considered the motions, the parties' submissions in support of and in opposition to the motions, the relevant portions of the record, and the governing law. Being fully advised,[3] the court DENIES Plaintiffs' motion for reconsideration and GRANTS in part Plaintiffs' motion to amend.

## II. BACKGROUND

Plaintiffs are individuals who signed contracts with and paid money to non-party Reed Hein & Associates ("Reed Hein"), doing business under the name "Timeshare Exit Team," for assistance in "exiting" their obligations with respect to timeshares they owned at various resort properties. (Compl. (Dkt. # 1) ¶¶ 16-66 (alleging facts regarding each of the named Plaintiffs).) Plaintiffs allege that Reed Hein charged them money up front for its services and promised them a "100% refund if they were not relieved of their timeshare obligations." (*Id.* ¶ 3; *see also id.* ¶ 81.) Reed Hein, however, allegedly failed to terminate Plaintiffs' timeshare obligations, made false statements about its services, and refused to refund Plaintiffs' money when the "exits" were unsuccessful or resulted in

[2] Plaintiffs also named Happy Hour Media Group, LLC ("Happy Hour Media Group") as a Defendant. (*See* Compl. ¶ 67.) Happy Hour Media Group did not respond to Plaintiffs' motions. (*See generally* Dkt.)

[3] Neither Plaintiffs nor the Lampo Defendants request oral argument (MFR at 1; MTA at 1; MFR Resp. at 1; MTA Resp. at 1) and the court finds that oral argument would not be helpful to its disposition of the motions, *see* Local Rules W.D. Wash. LCR 7(b)(4).

the resort properties foreclosing on Plaintiffs' timeshares. (*Id.* ¶¶ 3-4; *see also id.* ¶¶ 81-97 (describing Reed Hein's practices).)

On April 28, 2023, Plaintiffs filed this proposed class action against one individual and two business entities that played roles in promoting Reed Hein's services. (*See generally* Compl.) Plaintiffs allege that Reed Hein hired Defendant Happy Hour Media Group, a Kirkland, Washington-based marketing firm that acts as Reed Hein's "in-house marketing department"; Defendant Dave Ramsey, a nationally-syndicated radio talk-show host who offers "biblically based" financial advice; and Defendant The Lampo Group, Mr. Ramsey's wholly-owned company, to promote its timeshare exit services through Mr. Ramsey's popular radio shows, podcasts, seminars, websites, "Financial Peace University," and newsletters. (*Id.* ¶¶ 5-6, 109-54 (describing Mr. Ramsey's business and his relationship with Reed Hein).) Plaintiffs further allege that Reed Hein paid Mr. Ramsey and The Lampo Group over $30 million "to make false claims and instruct [Mr.] Ramsey's faithful listeners to hire Reed Hein." (*Id.* ¶ 5.) According to Plaintiffs, Mr. Ramsey "assured his listeners that he had vetted Reed Hein," "promised them that the company was the only trustworthy method to get out of their timeshare contracts," and "made false statements about Reed Hein's knowledge, skill, and ability to get customers out of timeshare obligations." (*Id.* ¶ 7; *see also id.* ¶¶ 131-32 (describing statements Mr. Ramsey made when endorsing Reed Hein).) Plaintiffs assert that Mr. Ramsey continued to promote Reed Hein even after listener complaints, lawsuits (including one brought by the Washington State Attorney General), and arbitrations filed against Reed Hein should have placed him on notice that Reed Hein was defrauding his

followers. (*See, e.g.*, *id.* ¶¶ 8, 121-22, 159-64.) By March 2021, Reed Hein started to lose money and stopped paying Mr. Ramsey to promote its services. (*Id.* ¶¶ 9, 107-08.) Subsequently, Mr. Ramsey stopped recommending Reed Hein's services to his followers. (*Id.* ¶¶ 10, 165.) Plaintiffs alleged claims on behalf of themselves and a proposed nationwide class against all Defendants for violation of the Washington Consumer Protection Act, negligent misrepresentation, and conspiracy, and against the Lampo Defendants only for unjust enrichment. (*Id.* ¶¶ 191 (proposed class definition), 201-215.)

On October 12, 2023, the court denied the Lampo Defendants' motion to strike Plaintiffs' class allegations and granted in part the Lampo Defendants' motion to dismiss. (*See* 10/12/23 Order at 13-14.) In relevant part, the court granted the Lampo Defendants' motion to dismiss Plaintiffs' unjust enrichment claim and dismissed that claim with prejudice and without leave to amend. (*Id.*) The court concluded that dismissal of the unjust enrichment claim was warranted because Plaintiffs failed to plausibly allege the first element of their claim: "a benefit conferred upon the defendant by the plaintiff." (*Id.* at 7-9 (quoting *Young v. Young*, 191 P.3d 1258, 1262 (Wash. 2008)).) The court relied on *Lavington v. Hillier*, in which the Washington Court of Appeals reviewed multiple cases and concluded that a "*plaintiff must confer a benefit on the defendant* to satisfy the first element of unjust enrichment." (*Id.* (quoting *Lavington v. Hillier*, 510 P.3d 373, 379 (Wash. Ct. App.), *rev. denied*, 518 P.3d 212 (Wash. 2022) (emphasis in *Lavington*))); *see also Lavington*, 510 P.3d at 379 ("The defendant must receive a benefit *from the plaintiff* for an implied contract to arise."). The court noted that Plaintiffs alleged that they paid money only to Reed Hein. (10/12/23 Order at 8; *see* Compl. ¶ 211

(alleging that "Plaintiffs conferred upon Defendants an economic benefit by entering into contracts and making payments to Reed Hein" that then "flowed" to the Lampo Defendants); *id.* ¶¶ 178-90 (alleging that each Plaintiff paid money to Reed Hein).) Thus, because Plaintiffs failed to allege any direct transfer of funds from Plaintiffs to the Lampo Defendants, the court dismissed Plaintiffs' unjust enrichment claim. (10/12/23 Order at 7-9.) The court dismissed the claim with prejudice and without leave to amend based its conclusion that Plaintiffs could "plead no facts consistent with the allegations in their complaint that would enable them to cure their unjust enrichment claim." (*Id.* at 9 (quoting *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)).)

On October 26, 2023, Plaintiffs timely moved for reconsideration of the portion of the October 12, 2023 order in which the court dismissed the unjust enrichment claim with prejudice and without leave to amend. (*See* MFR at 2 (stating that plaintiffs "do not request reconsideration on the dismissal of their unjust enrichment claims, but respectfully request the [c]ourt reconsider its order dismissing those claims with prejudice").) They argued that they could "plausibly allege a direct transfer of ownership" of Plaintiffs' funds to the Lampo Defendants under the constructive trust doctrine. (*Id.*; *see also id.* at 3-5 (setting forth the constructive trust argument).) On that same day, Plaintiffs also filed a motion to amend their complaint to (1) add claims for conversion and constructive trust; (2) add additional factual allegations related to their

claims; and (3) correct typographical and formatting errors. (*See* MTA at 2; Prop. Am. Compl. (Dkt. # 41-1) (showing redlined changes from Plaintiffs' original complaint).[4])

On October 27, 2023, the court ordered the Lampo Defendants to respond to Plaintiffs' motion for reconsideration and granted Plaintiffs leave to file a reply in support of their motion. (*See generally* 10/27/23 Order (citing Local Rules W.D. Wash. LCR 7(h)(3)).) The Lampo Defendants timely responded to Plaintiffs' motions and Plaintiffs filed timely replies. (*See* MFR Resp.; MTA Resp.; MFR Reply; MTA Reply.) Plaintiffs' motions are now ripe for decision.

## III. ANALYSIS

Below, the court first addresses Plaintiffs' motion for reconsideration and then considers Plaintiffs' motion to amend their complaint.

### A. Motion for Reconsideration

"Motions for reconsideration are disfavored," and the court "will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." Local Rules W.D. Wash. LCR 7(h)(1). "Reconsideration is an extraordinary remedy," and the moving party bears a "heavy burden." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

Plaintiffs ask the court to reconsider its decision to dismiss their unjust enrichment claim with prejudice and without leave to amend. (*See generally* MFR.) They argue that

[4] Plaintiffs also filed their redlined proposed amended complaint as an exhibit in support of their motion for reconsideration. (*See* Dkt. # 39-1.)

they can plausibly allege a direct transfer from Plaintiffs to the Lampo Defendants based on a constructive trust theory. (*Id.*) Plaintiffs argue that "[if] a fiduciary" (here, Reed Hein) "takes his or her clients' funds from trust and gives them to a third-party" (here, the Lampo Defendants), "then that is a direct transfer [from the clients to the third party] because there was no intermediary change of ownership." (*Id.* at 2.) Plaintiffs assert that because Reed Hein failed to hold their funds in trust but instead treated their funds as revenue, Reed Hein "held [Plaintiffs'] funds in constructive trust" and, as a result, Reed Hein's transfer of funds from the "constructive trust" to the Lampo Defendants must be considered a direct transfer of funds from Plaintiffs. (*Id.*; *see also* Prop. Am. Compl. ¶ 135 (alleging that "Reed Hein paid The Lampo Group and Dave Ramsey with customer funds which should have been held in trust, but which Reed Hein treated as revenue and spent").)

The court declines to accept Plaintiffs' novel theory of direct transfer. Plaintiffs ask the court to conclude that when a fiduciary breaches its duty to hold its client's funds in trust by putting the funds into its own account and then transfers funds from that account to a third party for its own purposes, the role of the breaching fiduciary falls out of the transaction and results in a direct transfer of funds from the client to the third party. They do not cite a single case, however, that supports such a holding. (*See generally* MFR; MFR Reply.) Moreover, although Plaintiffs cite cases discussing constructive trusts in their motion (*see* MFR at 5), they appear to have abandoned their constructive trust theory of unjust enrichment in their reply (*see generally* MFR Reply (including no mention of constructive trusts and arguing instead that because Reed Hein was a

fiduciary, it acted as Plaintiffs' agent when it transferred Plaintiffs' funds to the Lampo Defendants)). The court concludes that Plaintiffs have failed to show either manifest error in the court's prior ruling dismissing their unjust enrichment claim without leave to amend or new facts or legal authority which they could not have brought to the court's attention earlier with reasonable diligence. Local Rules W.D. Wash. LCR 7(h)(1). Therefore, the court denies Plaintiffs' motion for reconsideration.

**B. Motion to Amend**

Having concluded that Plaintiffs' unjust enrichment claim cannot be revived, the court now addresses Plaintiffs' motion to amend their complaint to (1) add new claims for conversion and constructive trust; (2) include additional factual allegations related to their claims; and (3) correct typographical and formatting errors. (*See* MTA at 2.)

1. <u>Legal Standards</u>

"A party may amend its pleading once as a matter of course no later than: (A) 21 days after serving it, or (B) . . . 21 days after service of a responsive pleading or 21 days after service of a motion [to dismiss] under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave [to amend the complaint] when justice so requires." *Id.*

Courts consider five factors when assessing a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the party has previously amended its pleading. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d

1149, 1160 (9th Cir. 1989)). Futility alone can justify denying leave to amend. *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015) (citing *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)). A proposed amendment is futile "if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Ralls v. Facebook*, 221 F. Supp. 3d 1237, 1245 (W.D. Wash. 2016) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)).

2. Whether Plaintiffs May Amend as a Matter of Course

As a threshold matter, Plaintiffs contend that they are entitled to amend their complaint as a matter of course because they filed their motion to amend within 21 days of the day Happy Hour Media Group filed its motion to dismiss and no party has filed a responsive pleading. (MTA at 3 (citing Fed. R. Civ. P. 15(a)(1)); *see* Happy Hour MTD (Dkt. # 32) (filed on October 5, 2023, and withdrawn on November 1, 2023).) As the Lampo Defendants point out, however, the weight of authority in the Ninth Circuit holds that where the 21-day period has expired as to some defendants but not to others, the plaintiff may amend as a matter of course only as to the defendants for whom the 21-day period has not yet expired. (MTA Resp. at 4-5 (quoting *Hylton v. Anytime Towing*, No. 11CV1039 JLS (WMc), 2012 WL 1019829, at *2 (S.D. Cal. Mar. 26, 2012), and citing additional cases so holding).) Thus, although Plaintiffs have a right to amend their complaint as a matter of course with respect to their claims against Happy Hour Media Group, they do not have that right with respect to their claims against the Lampo Defendants, who served their motion to dismiss in August 2023. (*See* Lampo MTD (Dkt. # 25) (filed on August 10, 2023).) Therefore, the court grants Plaintiffs' motion to amend

their complaint with respect to Happy Hour Media Group[5] and proceeds to consider Plaintiffs' motion for leave to amend their allegations and claims against the Lampo Defendants.

3. Whether to Grant Leave to Amend

Plaintiffs seek leave to amend their complaint to (1) add a new claim for conversion; (2) add a new stand-alone claim for constructive trust; and (3) include additional factual allegations regarding Defendants' record keeping. (MTA at 3-4.) The court considers each in turn.

*a. Conversion*

Plaintiffs seek leave to amend their complaint to allege a new claim against all Defendants for conversion. (MTA at 3-4; *see* Prop. Am. Compl. ¶¶ 236-42; *see also id.* ¶¶ 111-14.) The court grants Plaintiffs' request.

"Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession." *In re Marriage of Langham & Kolde*, 106 P.3d 212, 218 (Wash. 2005) (quoting *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 910 P.2d 1308, 1320 (Wash. Ct. App. 1996)). The plaintiff must have a property interest in the allegedly converted chattel. *Id.* at 219. Money can be converted "only if the defendant 'wrongfully received' the money or 'was under obligation to return the specific money to the party claiming it.'" *Davenport v. Wash. Educ. Ass'n*, 197 P.3d 686, 695

[5] Plaintiffs' proposed amendments with respect to Happy Hour Media Group include "additional information regarding [its] role in the alleged conspiracy and negligent misrepresentation." (MTA Reply at 8.)

(Wash. Ct. App. 2008) (quoting *Pub. Util. Dist. of Lewis County v. Wash. Pub. Power Supply Sys.*, 705 P.2d 1195, 1211 (Wash. 1985)). A claim for conversion of money is possible only where the money is "is capable of being identified, as when delivered at one time, by one act and in one mass, or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained." *Brown ex rel. Richards v. Brown*, 239 P.3d 602, 610 (Wash. Ct. App. 2010) (quoting *Westview Invs., Ltd. v. U.S. Bank Nat'l Ass'n*, 138 P.3d 638, 646 (Wash. Ct. App. 2006)).)

Defendants argue that Plaintiffs' proposed amendments are futile because Plaintiffs' own allegations show "that Reed Hein *mixed* customer funds with other money, and treated these comingled funds as general revenue, *before* ever paying money to the Lampo Defendants." (MTA Resp. at 9 (citing Prop. Am. Compl. ¶¶ 135, 236).) They cite *Brown ex rel. Richards v. Brown* for the proposition that "it is impossible to identify '***specific***' and '***identical***' money belonging to Plaintiffs, and subsequently received by the Lampo Defendants." (*Id.* (citing *Brown*, 239 P.3d at 610).) Plaintiffs counter that (1) *Brown* did not use the word "specific" in listing the ways money is "capable of being identified," (2) they make no allegation that Reed Hein commingled the funds it was supposed to be holding in trust for Plaintiffs with other funds, and (3) even if they did, their claim nevertheless survives because *Brown* involved comingled funds and a transfer of those funds to a third party. (MTA Reply at 5-6.)

The court agrees with Plaintiffs. *Brown* involved reverse mortgage proceeds belonging to the plaintiff that the plaintiff's son had wrongfully transferred from a joint

bank account to his own personal account, which already had funds in it. *Brown*, 239 P.3d at 610. The son then transferred $20,000 from his account to his girlfriend's personal bank account, which also already had funds in it. *Id.* The Washington Court of Appeals reversed the trial court's grant of summary judgment to the plaintiff on her conversion claim against the girlfriend, concluding that "reasonable minds could differ" on whether the girlfriend's "retention of the $20,000 constitutes an intentional and wrongful exercise of dominion and control over it." *Id.*

In so holding, the Washington Court of Appeals noted that "a substantial portion" of the $20,000 transfer was identifiable because this sum was far greater than the original balances in the plaintiff's joint account with her son and the son's personal account. *Id.* n.23. Thus, "even assuming that [the son] used non-equity funds first" when transferring the $20,000 to his girlfriend, the difference between the $20,000 and the original bank balances was identifiable loan proceeds. *Id.* As a result, Plaintiffs are correct that even if Reed Hein commingled their money with other funds, a conversion claim may nevertheless proceed if Plaintiffs can show that money that Reed Hein was supposed to hold in trust but instead transferred to Defendants remains identifiable.[6]

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[6] Defendants cite *SPUS8 Dakota LP v. KNR Contractors LLC*, 641 F. Supp. 3d 682, 700 (D. Ariz. 2022), for the proposition that "as a matter of blackletter Washington law, money is not identifiable chattel subject to conversion where an initial converter 'failed to segregate the specific amounts.'" (MTA Resp. at 9.) Contrary to Defendants' assertion, that case applies Arizona law and cites only Arizona cases. *See SPUS8 Dakota*, 641 F. Supp. 3d at 700-01. Thus, it is not authority for "blackletter Washington law." In any event, *SPUS8 Dakota* makes clear that "money can be the subject of a conversion claim if the money 'can be described, identified, *or* segregated." *Id.* (quoting *Hannibal-Fisher v. Grand Canyon Univ.*, 523 F. Supp. 3d 1087, 1098 (D. Ariz. 2021) (emphasis added)).

Because this is a question of fact that cannot be resolved at this stage of the proceedings, the court grants Plaintiffs' motion to amend their complaint to assert a claim for conversion.

*b. Constructive Trust*

Plaintiffs also seek leave to amend their complaint to allege a new claim against all Defendants for constructive trust. (MTA at 3-4; Prop. Am. Compl. ¶¶ 244-48; *see also id.* ¶¶ 106, 111-14, 135.) The court denies this request.

The court agrees with Defendants that Plaintiffs cannot plausibly allege a claim for constructive trust because a constructive trust is a remedy, rather than a substantive claim, and thus amendment would be futile. (*See* MTA Resp. at 7-8.) The Washington Court of Appeals recently held, in an unpublished case,[7] that "a constructive trust is a remedy, not a substantive claim" and affirmed dismissal of a constructive trust claim where the petitioner did not "allege sufficient facts to establish a substantive claim that could support the remedy." *In re Rule*, 23 Wash. App. 2d 1005, No. 83097-0-1, 2022 WL 3152591 at *2-*3 (Wash. Ct. App. Aug. 8, 2022) (unpublished) (citing *In re Gilbert Miller Testamentary Credit Shelter Tr. v. Estate of Miller*, 462 P.3d 878, 883 (Wash. Ct. App. 2020)); *see also id.* at *3 (holding that petitioner did not state a claim for unjust enrichment because she failed to allege a benefit conferred on the defendant by the

[7] Although unpublished opinions of the Washington Court of Appeals "have no precedential value and are not binding upon any court," they "may be accorded such persuasive value as the court deems appropriate." Wash. Gen. Rule GR 14.1; *see also Emps. Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003) ("[W]e may consider unpublished state decisions, even though such opinions have no precedential value.").

plaintiff). The court disagrees with Plaintiffs' assertion that it should follow two of its prior decisions in which it denied motions to dismiss stand-alone constructive trust claims: *Woodell v. Expedia Inc.*, No. C19-0051JLR, 2019 WL 3287896, at *12-13 (W.D. Wash. July 22, 2019); and *Aventa Learning, Inc. v. K12 Inc.*, No. C10-1022JLR, 2011 WL 13100748, at *10 (W.D. Wash. Mar. 28, 2011). (*See* MTA Reply at 6-7.) These cases pre-date *In re Rule*, and the court is persuaded by the Washington Court of Appeals's unequivocal statement in that decision that "[n]o authority . . . supports the position [that] a constructive trust is a substantive cause of action, rather than an equitable remedy." *In re Rule*, 2022 WL 3152591, at *2. Therefore, the court denies Plaintiffs' motion to amend their complaint to add a stand-alone constructive trust claim.

*c. Additional Allegations*

Finally, Plaintiffs also seek leave to add new allegations regarding Defendants' record-keeping related to customer referrals to Reed Hein "to support the plausibility of class certification" and to correct typographical and formatting errors. (MTA at 3-4; MTA Reply at 7-8; *see* Prop. Am. Compl. ¶¶ 145-53 (record-keeping allegations).) Defendants respond only that Plaintiffs' proposed factual amendments are unnecessary if the court denies Plaintiffs leave to add or amend their claims. (MTA Resp. at 1 n.1.) Because nothing in the record demonstrates that Plaintiffs' proposed amendments are in bad faith, unduly delayed, prejudicial to Defendants, or futile, *see Allen*, 911 F.2d at 373. the court grants Plaintiffs leave to amend to add allegations regarding record-keeping and to correct errors.

## IV. CONCLUSION

For the foregoing reasons, the court DENIES Plaintiffs' motion for reconsideration (Dkt. # 38) and GRANTS in part Plaintiffs' motion to amend (Dkt. # 40). The court DENIES Plaintiffs' request for leave to amend their unjust enrichment claim and to add a stand-alone claim for constructive trust. The court GRANTS Plaintiffs' request for leave to amend (1) with respect to their claims against Happy Hour Media Group, (2) to add a claim for conversion against all Defendants, (3) to add new factual allegations regarding Defendants' record-keeping, and (4) to address typographical and formatting errors. Plaintiffs shall file an amended complaint that complies with this order by no later than **December 15, 2023**.

Dated this 5th day of December, 2023.

JAMES L. ROBART
United States District Judge